

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**DOOR COUNTY COURTHOUSE EMPLOYEES UNION,
LOCAL 1658, COUNCIL 40, AFSCME, AFL-CIO, Complainant,**

vs.

DOOR COUNTY, Respondent.

Case 157
No. 65848
MP-4254

Decision No. 31696-A

Appearances:

Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Complainant.

Grant P. Thomas, Door County Corporation Counsel, 421 Nebraska Street, PO Box 670, Sturgeon Bay, Wisconsin 54235-0670, appearing on behalf of the Respondent.

**ORDER DENYING PRE-HEARING
MOTION TO DISMISS COMPLAINT**

Door County Courthouse Employees Union, Local 1658, Council 40, AFSCME, AFL-CIO, (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on May 3, 2006 alleging that Door County (Respondent) has committed prohibited practices in violation of Sec. 111.70(3)(a) 3 and 4, and derivatively 1, Stats. On July 18, 2006, Respondent filed its Answer to the Complaint and Motion to Dismiss Complaint. On August 4, 2006, Complainant filed its response to the Motion to Dismiss.

The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

Dec. No. 31696-A

ORDER

The pre-hearing Motion to Dismiss Complaint is denied.

Dated at Madison, Wisconsin, this 23rd day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

DOOR COUNTY

**MEMORANDUM ACCOMPANYING ORDER DENYING
PRE-HEARING MOTION TO DISMISS COMPLAINT**

Respondent, on July 18, 2006, filed its Answer to the complaint, as well as a Motion to Dismiss Complaint. The Motion to Dismiss Complaint asserts the following grounds:

1. The complaint fails to state a claim for which relief can be granted.
2. The Complainant has not alleged facts in the complaint sufficient to support a claim of prohibited practice or unfair labor practice.
3. To the extent that any alleged act, omission, prohibited practice or unfair labor practice set forth in the complaint occurred outside of the one year period of limitation set forth in Sec. 111.70(14) Wisconsin Statutes, the complaint was untimely filed and is time barred.

Complainant, on August 4, 2006, responded to the Motion to Dismiss as follows:

1. The complaint does state claims for which relief can be granted.
2. The complaint does assert facts which clearly and sufficiently support complainant's claim that the Respondent committed and continues to commit prohibited practices in violation of the law.
3. The complaint and all allegations made therein are timely pursuant to applicable Wisconsin Statutes.

Respondent's Motion to Dismiss Complaint is governed by Chapters 111 and 227. As Examiner Richard B. McLaughlin stated in ONEIDA COUNTY, DEC. NO. 28240-A (8/95):

Sec. 227.01(3), Stats., defines a "Contested case" to mean "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order."

The Commission is an "Agency" under Sec. 227.01(1), Stats., thus making this proceeding an "agency proceeding." To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined after a hearing required by law. . . .

. . .

Included in the remedy sought in the complaint is an order requiring Respondent to bargain collectively with Complainant by providing information and restoring the status quo, as well as an order to cease and desist from discouraging membership in Complainant labor organization. Complainant has asserted a substantial interest that, as reflected in the pleadings, is controverted by Respondent.

As Examiner McLaughlin stated in ONEIDA COUNTY, *supra*:

Chapter 227 does not provide a summary judgment procedure. The right to hearing is explicit, and the dismissal of a contested case prior to evidentiary hearing is not. Pre-hearing dismissal of a contested case is, then, an uncommon result:

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases . . . (I)t would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. 1/ (cite omitted)

The Commission has reflected this reluctance to deny hearing in its own case law:

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3;

See also: WAUSAU INSURANCE ET AL, DEC. NOS. 30018-C, 30019-C, and 30020-C (WERC, 10/03).

Liberally construing the complaint in favor of Complainant, the Examiner is satisfied that the complaint claims that Respondent has violated Sec. 111.70(3)(a)4, and, derivatively Sec. 111.70(3)(a)1, Stats., by:

1. Refusing to bargain collectively with Complainant by refusing to provide requested information;
2. Refusing to bargain collectively with Complainant by failing to maintain the status quo during a contract hiatus period by refusing to first lay off temporary employees;
3. Refusing to bargain collectively with Complainant by unilaterally negotiating with employees represented by Complainant regarding terms of employment in the Treasurer's office;

4. Refusing to bargain collectively with Complainant by failing to maintain the status quo during a contract hiatus period by offering temporary employment to laid off employees according to terms unilaterally established by Respondent in lieu of regular employment;
5. Refusing to bargain collectively with Complainant by failing to maintain the status quo during a contract hiatus period by refusing to consider a laid-off employee's application for employment and failing to offer the position to the senior qualified employee within seven (7) work days after the completion of the posting period;
6. Refusing to bargain collectively with Complainant by failing to maintain the status quo during a contract hiatus period by provisionally offering the Clerk Typist I position to laid off employees subject to a unilaterally established wage, probationary period and consequence for failure to complete the probationary period;
7. Refusing to bargain collectively with Complainant by failing to maintain the status quo during a contract hiatus period by refusing to arbitrate grievances arising during the hiatus period;

Liberalizing the complaint in favor of Complainant, the Examiner is satisfied that the complaint also claims that Respondent has violated Sec. 111.70(3)(a)3, and, derivatively Sec. 111.70(3)(a)1, Stats., by discouraging membership in a labor organization by discrimination and interference through the elimination of the position occupied by a successful grievant, *i.e.*, Sarah Bryan.

Section 111.07(14), Stats., made applicable to the filing of complaints under MERA by Sec. 111.70(4)(a), Stats., provides:

The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

The complaint was filed on May 3, 2005. The Respondent conduct that gives rise to Complainant's claimed violations of Sec. 111.70(3)(a)1, 3 and 4, as described above, is alleged to have occurred between November of 2005 and April of 2006. The complaint, on its face, does not raise any allegation that is untimely under Sec. 111.07(14).

In summary, with respect to each of Complainant's claims, the complaint states a cause of action over which the Commission has jurisdiction and may grant relief. The pleadings establish that there are material facts in dispute. These disputed facts may not be resolved without an evidentiary hearing.

The complaint presents a contested case requiring a full hearing on the pleadings. Respondent's Pre-Hearing Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 23rd day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

